Appeals Before The Bankruptcy Appellate Panel Of The Ninth Circuit

A MANUAL FOR LITIGANTS

Summer 2004

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I. INTRODUCTION[1]

These materials are designed to assist counsel who find themselves involved in a bankruptcy appeal before the BAP.

Appellate rules are found in Part VIII of the Federal Rules of Bankruptcy Procedure (FRBP), Rule 8001 et seq. Local rules of either the district court or the BAP rules also apply. Revised local rules for practice before the BAP were adopted by the Ninth Circuit Judicial Council on February 24, 2000, and may be found on the BAP website at www.ce9.uscourts.gov/bap.

Where national and local rules are silent or where they so specify, the Federal Rules of Appellate Procedure (FRAP), the Federal Rules of Civil Procedure (FRCP), the Federal Rules of Evidence (FRE) or the Ninth Circuit Rules (Circuit Rule) may apply. See 9th Cir. BAP R. 8018(b)-1.

II. JURISDICTION OF BAP

Under the Bankruptcy Code the district court has always had the jurisdiction to review decisions of a bankruptcy court. 28 U.S.C. § 158(a).[2] However, a circuit may establish a BAP, 28

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[1] This summary is the cumulative work of many current and former BAP judges, law clerks and staff dedicated to the common pursuit of providing up-to-date materials to the public and bar. These materials were first prepared and released on March 15, 1985, by the Hon. Sidney C. Volinn, who served as a BAP Judge and Bankruptcy Judge from the Western District of Washington. It has been frequently updated.

The analysis contained herein is summary in nature, is not intended as legal advice, and is no substitute for legal research. It is the responsibility of attorneys and litigants to review and comply with applicable laws and rules governing appellate practice and procedure.

[2] 28 U.S.C. § 158(a) provides:

> (a) The district courts of the United States shall have jurisdiction to hear appeals
>
> (1) from final judgments, orders, and decrees;
>
> (2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

U.S.C. § 158(b), and the Ninth Circuit has had BAP since the effective date of the Bankruptcy Code, October 1, 1979.[3] The Bankruptcy Reform Act of 1978, which became effective on October 1, 1979, authorized the creation of the BAP. Then, following the decision of Northern Pipeline Constr. Co. v Marathon Pipe Line Co., 458 U.S. 50 (1982)(holding that the Act unconstitutionally conferred the essential attributes of judicial power on non-Article III bankruptcy judges), and passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Ninth Circuit re-established the BAP by Order of the Judicial Council, in 1985. That order was most recently amended as of May 9, 2002, and is set forth at the end of these materials.

III. INTRODUCTION TO BAP

Seven bankruptcy judges are authorized by the Ninth Circuit Judicial Council to serve on the BAP. Each case is heard by a panel of three judges. No bankruptcy judge may hear an appeal originating from his or her district. 28 U.S.C. § 158(b)(5).[4]

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(3) with leave of the court, from other interlocutory orders and decrees;

of bankruptcy judges entered in cases and proceeding referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

[3] Currently, the First, Sixth, Eighth and Tenth Circuits also have established BAPs. In late December 1999, the Second Circuit discontinued its BAP because only a few of the smaller districts in that circuit participated (significantly, the Southern District -- New York City, did not authorize bankruptcy appeals to the Second Circuit BAP). District judges must authorize appeals to BAP from their districts (28 U.S.C. § 158(b)(6)), and all of the districts of the Ninth Circuit have granted that authorization.

[4] 28 U.S.C. § 158(b)(5) provides:

An appeal to be heard under this subsection shall be heard by panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

The BAP judges are all active trial court judges from around the circuit. All maintain a regular trial docket in their home districts. Currently there are six members of BAP; the seventh position is being intentionally left vacant to reflect the BAP's reduced filing numbers and to allow opportunities for *pro tem* judge participation. The current members of BAP are:

Hon. Elizabeth Perris (D. Ore), Chief Judge
Hon. Philip H. Brandt (W.D. Wash)
Hon. Christopher M. Klein (E.D. Cal)
Hon. James M. Marlar (D. Ariz)
Hon. Dennis Montali (N.D. Cal)
Hon. Erithe Smith (C.D. Cal)

BAP judges are appointed by the Circuit for a seven-year term. At the end of that term, they may seek reappointment for an additional three years. Each BAP judge has an extra law clerk. Some of the judges utilize both clerks on BAP matters and on their regular "home court" assignments while others divide the duties between their two clerks.

The BAP also utilizes *pro tem* judges on a routine basis in order to give appellate experience to other bankruptcy judges within the Ninth Circuit. Those judges sit for one-day merits calendar assignments and have equal votes with the regular BAP judges. They normally do not participate on motions. The contribution of the *pro tem* judges allows the BAP to set more calendars and hear more cases than it could otherwise. Collectively, the *pro tem* judges perform the work equivalent of an additional BAP judge.

The BAP hears cases nine months out of the year with the three-judge panels traveling to various venues in the Ninth Circuit. It does not normally hold hearings during April, August and December. The BAP continues to explore ways to utilize teleconferencing and video conferencing and to expand technology in order to provide quicker and more convenient hearings for lawyers and litigants. For this purpose, the BAP has been able to use existing equipment in several districts. For example, BAP hearings have been held several times in Las Vegas where some of the cases originated from Reno, with those litigants appearing by video. The panel has used a Santa Ana - Riverside connection as well. Cases from Montana, Idaho, Eastern and Western Washington, and Oregon have also been conducted by video. The Ninth Circuit has video conferencing equipment in its Pasadena and San Francisco courtrooms, and video-conference cases are often scheduled as part of the regular hearing calendars at those locations.

The BAP is staffed by its Clerk, a Deputy Clerk, two staff attorneys, and other personnel who maintain the files and dockets and otherwise run the business of the court. The following is additional information about the clerk's office:

> Address: Court of Appeals Building, 125 South Grand Avenue, Pasadena, California 91105
> Telephone: appeals from Central District of California (626) 229-7220; appeals from all other districts (626) 229-7225.
> Filing Hours: Monday - Friday, 8:30 a.m. to 5:00 p.m.
> Web Site: www.ce9.uscourts.gov/bap
> PACER Site: https://pacer.bap09.uscourts.gov

IV. PRACTICE BEFORE THE BAP

To practice before the BAP, an attorney must be admitted and in good standing to practice before the Ninth Circuit Court of Appeals or a district court within the Ninth Circuit. An attorney not so admitted may request permission to appear in a specific case by motion to the BAP. 9th Cir. BAP R. 9010-1.

Once a case has been set for oral argument, continuances are rarely granted. By separate pleading or letter at the time of briefing, counsel should advise the BAP Clerk of known scheduling conflicts occurring during the third week of upcoming months when BAP arguments are likely to be scheduled. The BAP Clerk will work with the parties to resolve scheduling conflicts and other matters concerning argument. Prior to contacting the Clerk, the movant should contact opposing counsel so that the position of both sides may be conveyed.

V. STARTING THE APPEAL PROCESS

A. Time and Method for Filing a Notice of Appeal

A notice of appeal must be filed with the bankruptcy court within 10 calendar days of entry of the judgment, order, or decree appealed from. FRBP 8001(a), 8002, and 9006(a). If a timely notice of appeal is filed, any other party may file a notice of appeal (often a cross-appeal) within 10 days of the date on which the first notice of appeal was filed. Id. The appellant must attach to the notice of appeal a copy of the entered judgment, order or decree from which the appeal was taken, if available. 9th Cir. BAP R. 8001(a)-1. The timely filing of a notice of appeal is "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978); see also Slimick

v. Silva (In re Slimick), 928 F.2d 304, 306 (9th Cir. 1990).

Discretionary extensions may be granted by the bankruptcy court, with some exceptions[5], upon written motion. If a motion is filed before the expiration of the original 10-day period, an extension may be given up to 20 days from the expiration of the time for filing a notice of appeal. If the motion is filed not later than 20 days after the expiration of the original 10-day period, an extension may be granted upon a showing of excusable neglect. See Pincay v. Andrews 351 F.3d 947 (9th Cir. 2003)(mistake by attorney in delegating task of determining appeal deadline to nonlawyer not considered excusable neglect). Such an extension may be up to 10 days from the date of entry of the order granting the motion. Once the appeal period has expired, it cannot be resurrected. The panel may not extend the time requirements of FRBP 8002. *See* Fed. R. Bankr. P. 8019 and 9006(b)(3).

B. Tolling Motions

If, within 10 days of entry of the judgment, order or decree, a party files a motion (1) to amend or make additional findings of fact under FRBP 7052, (2) to alter or amend the judgment under FRBP 9023, (3) for a new trial under FRBP 9023, or (4) for relief under FRBP 9024, then the 10 days for filing an appeal runs from the entry of the order disposing of the last such motion outstanding. FRBP 8002(b). The BAP considers a motion for reconsideration filed within 10 days to be a motion to "alter or amend the judgment" within the meaning of FRBP 8002(b). Bentley v. Bank of Coronado (In re Crystal Sands Props.), 84 B.R. 665, 668 & n.3 (9th Cir. BAP 1988). *See generally* 16A Wright & Miller, Federal Practice & Procedure § 3950.4.

[5] Fed. R. Bankr. P. 8002(c) prohibits the bankruptcy court from extending the time to appeal orders granting relief from stay; authorizing sale or use of property, extensions of credit and use of cash collateral; assumption and assignment of executory contracts; approval of a Chapter 11 disclosure statement; and confirmation of a plan under Chapters 9, 11, 12 and 13.

C. Premature Notice of Appeal

A premature notice of appeal (a notice of appeal filed after the announcement of a decision but before entry of the judgment or order) is treated as filed after such entry and on the day thereof. FRBP 8002(a). If the notice of appeal is filed before entry of the order being appealed, the appellant must forward to the BAP Clerk a copy of the judgment or order immediately upon entry. 9th Cir. BAP R. 8001(a)-1.

D. Election to the District Court (Opt-Out)

The appeal from the bankruptcy court automatically goes to the BAP unless a party timely elects to have the appeal heard by the district court. 28 U.S.C. § 158(b)(1).

A party might choose to have an appeal heard by the district court if other litigation or related appeals are already pending in the district court, or if there is adverse BAP authority on the party's issue.

1. The objection to having the appeal heard by the BAP must be made as a "Statement of Election" in a separate writing. FRBP 8001(e); Arkansas Teachers Ret. Sys. v. Official Inv. Pool Participants Comm. (In re County of Orange), 183 B.R. 593 (9th Cir. BAP 1995) (election must be in a separate document, filed separately from the notice of appeal). Amended Order Continuing Bankruptcy Appellate Panel of the Ninth Circuit (Amended May 9, 2002).

2. Deadline for filing Statement of Election. In Ioane v. Collins (In re Ioane), 227 B.R. 181, 183 (9th Cir. BAP 1998), the BAP held that the statutory deadline for making the election is the time the notice of appeal is filed (rather than the date that the order is entered), even if the notice of appeal is filed prematurely. If the appellant moves for leave to appeal but fails to concurrently file a separate notice of appeal, the motion for leave shall be treated as if it were a notice of appeal for purposes of calculating the time period for filing an election. 9th Cir. BAP R. 8001(e)-1(b).

3. "Any other party" (e.g., the appellee) must make the election not later than 30 days after service of notice of the appeal. 28 U.S.C. § 158(c)(1). In HBI, Inc. v. Sessions Payroll Mgm't, Inc. (In re Mackey), 232 B.R. 784, 787 (9th Cir. BAP 1999), the BAP held that the 30-day deadline begins to run on the date of the court's mailing, not the date that the order being appealed is entered, and that the 3-day extension provided for by FRBP 9006(f) applies when service is performed by mail, giving "any other party" 33 days to file the statement of election after the clerk serves the notice of appeal.

4. The BAP Panel "may transfer an appeal to the district court to further the interests of justice, such as when a timely statement of election has been filed in a related appeal, or for any other reason the Panel deems appropriate." 9th Cir. BAP 8001(e)-1.

   Under Perroton v. Gray (In re Perroton), 958 F.2d 889 (9th Cir. 1992) and Determan v. Sandoval (In re Sandoval), 186 B.R. 490, 496 (9th Cir. BAP 1995), the BAP has no authority to grant *in forma pauperis* motions under 28 U.S.C. § 1915(a) because bankruptcy courts are not "court[s] of the United States" as defined in 28 U.S.C. § 451. Consequently BAP has transferred some of those motions and related appeals to the district court.

E. Final Orders

In general, the BAP has jurisdiction to hear bankruptcy appeals from final judgments, orders, and decrees. See 28 U.S.C. § 158. In addition, with leave of the Panel, the BAP has jurisdiction to hear appeals from certain interlocutory orders and decrees. 28 U.S.C. § 158; see also Official Comm. of Unsecured Creditors v. Credit Lyonnais Bank Nederland, N.V. (In re NSB Film Corp.), 167 B.R. 176, 180 (9th Cir. BAP 1994). *See generally* 16A Wright & Miller, Federal Practice & Procedure § 3950.2.

1. Definition of Finality

   The standard for determining finality in the bankruptcy context is more flexible than in other areas. NSB Film Corp., 167 B.R. at 180. In

contrast to an ordinary civil case where "a complete act of adjudication ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," a bankruptcy order is final if it "end[s] any interim disputes from which appeal would lie." Slimick, 928 F.2d at 307 n.1 (internal quotations and citations omitted). An order is appealable under the "flexible finality" doctrine if it "1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." Elliott v. Four Seasons Props., Inc. (In re Frontier Props., Inc.), 979 F.2d 1358, 1363 (9th Cir. 1992). For a recent discussion of pragmatic finality in bankruptcy, see Saxman v. Educ. Credit Mgt. Corp (In re Saxman), 325 F.3d 1168 (9th Cir. 2003) (and the dissent).

Examples of orders held to be final are: orders granting or denying relief from stay, In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996); an order confirming a chapter 11 debtor's reorganization plan, Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.), 761 F.2d 1374 (9th Cir. 1985); an order allowing or disallowing an exemption, In re Jones, 768 F.2d 923 (9th Cir. 1985); an order substantively consolidating bankruptcy cases, Alexander v. Compton (In re Bonham), 229 F.3d 750 (9th Cir. 2000); sale of property to a good-faith purchaser, In re Southwest Products, Inc. 144 B.R. 100 (9th Cir. BAP 1992), but see In re M Capital Corporation 290 B.R. 743 (9th Cir. BAP 2003); In re Thomas 287 B.R. 782 (9th Cir. BAP 2002). Examples of orders held to be interlocutory are: denial of a motion to dismiss a bankruptcy case or adversary proceeding, Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.), 894 F.2d 1136 (9th Cir. 1990); Morrison-Knudsen Co., Inc. v. CHG Int'l, Inc., 811 F.2d 1209, 1214 (9th Cir. 1987); Ditter v. Greenberg (In re Ditter), 205 B.R. 213 (9th Cir. 1996); order denying a motion for summary judgment, Comsource Independent Foodservice Cos., Inc. v. Union Pacific R. Co., 102 F.3d 438, 441-42 (9th Cir. 1996); order imposing monetary sanctions against an attorney, Cunningham v. Hamilton County, Ohio, 527 U.S. 198 (1999). But see Golant v. Levy (In re Golant), 239 F.3d 931, 935 (7th Cir. 2001) ("we were unable to uncover any cases

discussing how Cunningham might alter the long-held view that sanctions which completely eliminate the possibility of a decision on the merits--such as a default judgment or dismissal--are "final" for the purpose of appeal."); Reorganized Solomat Enters., Inc. v. Ibar (In re Solomat Partners, L.P.), 231 B.R. 149, 151 (2d Cir. BAP 1999) (holding that denial of civil contempt motions was final and appealable); order granting motion to reopen a bankruptcy case, Wilborn v. Gallagher (In re Wilborn), 205 B.R. 202 (9th Cir. BAP 1996).

Note: Finality for purposes of jurisdiction over "as of right" appeals under 28 U.S.C. § 158(a)(1) in adversary proceedings does not differ from finality in ordinary federal civil actions under 28 U.S.C. § 1291, thus FRCP 54(b) applies. Belli v. Temkin (In re Belli), 268 B.R. 851 (9th Cir BAP 2001).

2. Separate Document Rule

FRBP 9021 requires that the order/judgment appealed must be entered on a separate document. FRBP 9021, making applicable FRCP 58; Corrigan v. Bargala, 140 F.3d 815, 817 (9th Cir. 1998); United States v. Schimmels (In re Schimmels), 85 F.3d 416, 420-21 (9th Cir. 1996). An order that does not comply with the separate document rule may be held to be not final. Application of the separate document rule may be waived. Boggan v. Hoff Ford, Inc. (In re Boggan), 251 B.R. 95, 98 n.2 (9th Cir. BAP 2000). Amended Federal Rule of Civil 58, effective December 1, 2002, now makes orders final after 150 days even if not set forth as separate judgments.

3. Minute Entries / Minute Orders

A minute entry is a final order if it states that it is an order, was mailed to counsel, is signed by the clerk who prepared it, and is entered on the docket sheet. Kuan v. Lund (In re Lund), 202 B.R. 127, 130 (9th Cir. BAP 1996).

4. Leave to Appeal

To appeal an interlocutory order, one must file a notice of appeal along with a motion for leave to appeal. FRBP 8001(b). Although filed in the bankruptcy court, the leave motion is to the Panel. The Panel is the court that grants or denies leave. The motion for leave to appeal must contain: (1) a statement of facts necessary to an understanding of the questions to be presented by the appeal; (2) a statement of the questions to be presented; (3) a statement of the reasons why the appeal should be heard; and (4) a copy of the judgment, order, or decree complained of and any opinion or memorandum relating to that order or judgment. FRBP 8003(a).

Note: depending upon the reason the order is interlocutory, the appellant can also seek certification from the bankruptcy judge under FRCP 54(b), made applicable by FRBP 7054 and 9021 (through FRCP 58). If the bankruptcy court makes an "express determination that there is no just reason for delay" in entry of a final judgment on a particular matter, the court can then make an "express direction" for the entry of final judgment on part of an action and the matter is then final for purposes of appeal. An order that purports to be a final order on fewer than all causes of action or parties will not be considered final absent such express determination and direction.

i. Standard for Granting Leave to Appeal

Leave to appeal is normally limited to situations that would avoid wasteful litigation, involve a controlling question of law as to which there is substantial ground for difference of opinion, and would materially advance the ultimate termination of the litigation. Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995); In re Travers 202 B.R. 624, 626 (9th Cir. BAP 1996).

The BAP's decision to deny leave to appeal is an exercise of discretion and generally not reviewable by the Ninth Circuit. Silver Sage

Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs), 327 F.3d 930, 938 (9th Cir. 2003). See Baldwin v. Redwood City, 540 F.2d 1360, 1364 (9th Cir. 1976) (holding that the appellant could not pursue an interlocutory appeal because it was untimely, but that interlocutory order would merge into the final judgment and could be challenged upon timely appeal from the final judgment).

VI. DESIGNATION OF THE RECORD

A. Perfection of the Appeal

Within 10 days after filing the notice of appeal, the appellant must file with the clerk of the bankruptcy court and serve on the appellee a designation of items to be included in the record ("DOR") on appeal AND must file and serve a Statement of Issues on Appeal ("SOI"). FRBP 8001 & 8006. For appeals pending before the BAP, a DOR is not a copy of every item to be included in the record. It is a list of the items that make up the record, usually identified by docket number and filing date, as well as a description of the item (e.g. "plaintiff's opposition to motion for fees," "declaration in support of motion to dismiss").[6]

Within 10 days of service of the appellant's DOR and SOI, the appellee may file a designation of additional items to be included in the record. FRBP 8006.

The Panel need not consider items not included in the DOR. See id. Items that were not before the bankruptcy court will not be allowed unless they pertain to mootness that arose after the order on appeal.

If the appellee has cross-appealed, it may file an SOI to be presented on cross-appeal and a DOR. Id. Otherwise, appellees do not file a SOI, even if they disagree with appellant's framing of the issues. Any such conflict should be addressed in appellee's brief.

[6] For appeals pending before the district court, litigants should check their district's local rules for requirements regarding the DOR.

The DOR shall include all transcripts necessary for adequate review in light of the standard of review to be applied to the issues before the Panel. See 9th Cir. BAP R. 8006-1. If the record includes a transcript, the party designating the transcript must immediately deliver to the court reporter a written request for the transcript and make arrangements for payment. FRBP 8006.

If a tentative ruling is necessary to understanding the final ruling, it must be included in the designation and excerpts of record. Gertsch v. Johnson & Johnson Fin. Corp. (In re Gertsch), 237 B.R. 160, 169 (9th Cir. BAP 1999).

The appellant shall serve and file excerpts of the record as an appendix when the opening brief is filed. FRBP 8009(b).

B. Completion of the Record

When the reporter completes the transcript, the reporter files it with the clerk of the bankruptcy court. FRBP 8007(a). The reporter is supposed to complete the transcript within 30 days, but may ask the clerk for an extension. Id.

When the record is complete, the clerk of the bankruptcy court transmits a Certificate of Record or Readiness to Transmit Record to the clerk of the BAP. See FRBP 8007(b); 9th Cir. BAP R. 8007(b)-1. After reviewing the appeal for jurisdiction, the BAP clerk will issue a briefing schedule.

C. Consequences of Incomplete Record

The burden of presenting a proper record to the appellate court is on the appellant. Sallie Mae Servicing, L.P. v. Williams (In re Williams), 287 B.R. 787, 791 (9th Cir. BAP 2002); Kritt v. Kritt (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995. Unless the record before the appellate court affirmatively shows the matters on which appellant relies for relief, the appellant may not argue those matters on appeal. 10 L. King Collier on Bankruptcy ¶ 8006.03[1] (15th ed rev. 2000); Everett v. Perez (In re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir. 1994). The failure to provide an adequate record may result in dismissal of the appeal or a waiver of issues dependent upon the

record. McCarthy v. Prince (In re McCarthy), 230 B.R. 414, 416 (9th Cir. BAP 1999). When an appellant challenges a factual finding, the failure to provide an adequate record may be grounds for affirmance. Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991).

VII. MOTIONS

A. An area of appellate practice that is familiar to appellate lawyers, but not necessarily to trial lawyers and trial judges, is the sheer number of motions filed in appellate cases. The BAP receives approximately 40 to 50 motions a month. The BAP judges rotate sitting on monthly "motions panels." These panels are normally made up of three judges, who decide the motions in a collegial manner. Some motions that are not case dispositive (e.g., extension of time to file briefs) may be decided by fewer judges or by the BAP Clerk, based on delegated authority. Typically, the progress of a motion is:

1. Motion is filed with the BAP FRBP 8011(a).

The motion must state with particularity the grounds for bringing the motion, set forth the relief sought and attach declarations and supporting materials. Id.

On a substantive motion, the opposing party has seven days after service to file an opposition. Id.

Motions for procedural orders may be acted upon at any time without an opportunity to respond. FRBP 8011(b).

2. Motion is immediately reviewed and summarized by one of the staff attorneys. Staff attorneys make written analyses and recommendations and prepare a proposed form of order.

3. The motion, any responses or replies, and the staff attorney's workup are transmitted to the motions panel judges by e-mail or overnight delivery.

4. Motions panel judges immediately review the paperwork, and communicate their votes and modifications to the proposed order to one another and to the staff attorney. Motions will be

decided without a hearing unless the court orders otherwise. FRBP 8011(c).

5. Once a decision has been voted upon by each of the panel judges, and certified by the assigned lead judge, the Clerk will issue the order on behalf of the Panel and distribute it to the parties.

   Occasionally, panel judges will split on their vote, which then results in a dissent or a separate concurrence relative to that motion.

   Motions are handled very quickly, so that the oral argument times are not delayed. Orders disposing of motions are rarely published expect where an important point of law has been resolved (e.g., T.C. Investors v. Joseph (In re M Capital Corp.), 290 B.R. 743 (9th Cir. BAP 2003)(burden of proof on party asserting good faith seeking protection of 11 U.S.C. § 363(m) to prove good faith with evidence); Ho v. Dai Hwa Electronics (In re Ho), 265 B.R. 603 (9th Cir. BAP 2001) (bankruptcy court retains jurisdiction to rule on motion for stay pending appeal after notice of appeal has been filed).

6. Rulings by a motions panel are not binding on the merits panel. Gschwend v. Markus (In re Markus), 268 B.R. 556, 565 (9th Cir. BAP 2001).

B. Motion for Stay Pending Appeal

Requests for a stay pending appeal normally should be presented to the bankruptcy judge first, FRBP 8005. The bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal after a notice of appeal has been filed. Ho, supra.

Parties may file a motion for stay pending appeal directly with the appellate court only if they explain why relief was not first obtained from the bankruptcy court. FRBP 8005.

The movant has the burden of showing that the bankruptcy court abused its discretion in not granting a stay. 9th Cir. BAP R. 8011(d)-1 (explanatory note) (citing Wymer v. Wymer (In re Wymer), 5 B.R. 802, 805-07 (9th Cir. BAP 1980)). A stay pending appeal is in the nature of a preliminary injunction and must satisfy

four elements: (1) appellant is likely to succeed on the merits; (2) appellant will suffer irreparable injury if no stay is granted; (3) no substantial harm will come to appellee as a result of a stay; and (4) the stay will not harm the public interest. Wymer, 5 B.R. at 808.

The bankruptcy court may require the posting of a bond as a condition to granting a stay pending appeal. FRBP 8005. If an appeal is from a money judgment in bankruptcy, the supersedeas stay is available as a matter of right. The court has discretion in determining the sufficiency of the bond and the adequacy of the surety. FRBP 7062(d); Farmer v. Crocker Nat'l Bank (In re Swift Aire Lines, Inc.), 21 B.R. 12, 13-14 (9th Cir. BAP 1982).

C. Motions to Dismiss for Lack of Jurisdiction

Appellants occasionally appeal an issue that the BAP does not have jurisdiction to consider for various reasons, including the appellants lack standing; the notice of appeal was untimey; or because the appeal has become moot. Although jurisdictional issues may be raised by the court sua sponte, see Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 889 (9th Cir. 1992), it generally makes sense for an appellee to file a motion to dismiss the appeal as early as possible to save the costs of briefing in a case that will ultimately be dismissed. Thus, it is important to recognize the following concepts of standing and mootness in a bankruptcy context.

1. Lack of Finality

The BAP has jurisdiction over appeals from only two categories of interlocutory order: (1) orders under 11 U.S.C. § 1121(d) increasing or reducing exclusivity time periods, 28 U.S.C. § 158(a)(2) Official Committee of Unsecured Creditors v.Henry Mayo Newhall Memorial(In re Henry Mayo Newhall Memorial Hospital), 282 B.R. 444 (9th Cir. BAP 2002)(question of whether "cause" existed to adjust exclusivity period was mixed question of law and fact, that was reviewable de novo); and (2) interlocutory orders as to which the BAP grants a motion for leave to appeal. 28 U.S.C. § 158(a)(3). In other words, there is no jurisdiction over an interlocutory order (except a

§ 1121(d) order) until the BAP actually grants leave to appeal.

2. Standing

Standing is a jurisdictional issue that is open to review at all stages of the litigation. See National Org. For Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994). Questions of standing are reviewed de novo. See Barrus v. Sylvania, 55 F.3d 468, 469 (9th Cir. 1995). Because standing is a jurisdictional requirement, the BAP must dismiss an appeal when no standing exists.

Neither the Bankruptcy Code nor Title 28 lays out the requisites for standing on appeal. See 1 Collier on Bankruptcy ¶ 5.06. The Ninth Circuit follows the "person aggrieved" standard for standing. See Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983) (only parties that are pecuniarily affected by a bankruptcy court order or judgment have standing to appeal). For a current discussion of various standing doctrines see In re Godon, Inc., 275 B.R. 555 (Bankr. E.D. Cal. 2002).

The United States Trustee ("UST") has statutory standing conferred by 11 U.S.C. § 307 to appeal and to intervene in an appeal. Stanley v. McCormack, Barstow, Sheppard, Wayte & Carruth (In re Donovan Corp.), 215 F.3d 929 (9th Cir. 2000).

3. Mootness

In addition to the constitutional mootness implicit in the Article III "case" or "controversy" requirement, two lines of bankruptcy mootness cases have developed in the Ninth Circuit. One line focuses on the court's ability to fashion meaningful relief. In re Baker & Drake, Inc., 35 F.3d 1348, 1351-52 (9th Cir, 1994); In re Spirtos, 992 F. 2d 1004 (9th Cir. 1993).

The other applies when an order authorizes the sale of property, and implements 11 U.S.C. § 363(m) premised on the particular need for finality of such orders. Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.),

846 F.2d 1170, 1172 (9th Cir. 1988) ("Bankruptcy's mootness rule 'developed from the general rule that occurrence of events which prevent an appellate court from rendering effective relief renders an appeal moot, and the particular need for finality in orders regarding stays in bankruptcy.'"); Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1419 (9th Cir. 1996), cert. denied, 519 U.S. 1054, 117 S. Ct. 681 (1997); Vista Del Mar Assocs., Inc. v. West Coast Land Fund (In re Vista Del Mar Assocs.), 181 B.R. 422 (9th Cir. BAP 1995).

Note, however, that the mootness rule operates only when a purchaser bought an asset in good faith. Courts generally follow the traditional principles that a good faith purchaser is one who buys "in good faith" and for "value." In re M. Capital Corp., 290 B.R. 743, 746 (9th Cir. BAP 2003) (emphasizing the need to establish an evidentiary record with necessary findings of fact and conclusions of law on the good faith issue).

Examples of mootness. The following are common examples of mootness in the bankruptcy context: (1) when funds have been disbursed to non-parties or when the failure to obtain a stay causes "such a comprehensive change of circumstances as to make it inequitable to consider the merits of the appeal." Beatty v. Traub (In re Beatty), 162 B.R. 853, 856 (9th Cir. BAP 1994); (2) where a chapter 11 plan has "been so far implemented that it [would be] impossible to fashion effective relief for all concerned" and where reversal of the order confirming the plan "would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court." Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.), 652 F.2d 793, 797 (9th Cir. 1981); (3) where real property central to the appeal has been foreclosed upon without leaving appellant statutory rights of redemption. See Onouli-Kona Land Co., 846 F.2d at 1172-73; (4) sales of real property, Comty. Thrift & Loan v. Suchy (In re Suchy), 786 F.2d 900, 902 (9th Cir. 1986); (5) orders involving § 363(m), which approve a sale or lease of property, Paulman v. Gateway Venture Partners III, L.P. (In re Filtercorp., Inc.), 163 F.3d 570, 576 (9th Cir.

1998); and (6) sale of partnership assets. Prichard v. Sherwood & Roberts, Inc. (In re Kings Inn, Ltd.), 37 B.R. 239, 242-43 (9th Cir. BAP 1984).

D. Emergency Motions

1. If the motion involves an "emergency" that needs expedited action in order to avoid irreparable harm, put "EMERGENCY" in the title. FRBP 8011(d). Include a cover page bearing the legend "Emergency Motion" in large, bold type. 9th Cir. BAP R. 8011(d)-1(a). An original and three copies of the motion must be filed with the BAP Clerk accompanied by an appendix containing the items specified by 9th Cir. BAP R. 8011(d)-1(c).

2. Always attach a declaration stating the nature of the emergency. FRBP 8011(d); 9th Cir. BAP R. 8011(d)-1(b). The motion should also state whether all grounds in support of the motion were submitted to the bankruptcy judge and, if not, why the motion should not be remanded to the bankruptcy judge for reconsideration. FRBP 8011(d).

3. Notify opposing counsel and state in a declaration when and how counsel was notified; there is a specific duty on the movant to "make every practicable effort to notify opposing counsel in time for counsel to respond to the motion." FRBP 8011(d). The motion papers must be accompanied by a proof of service showing service on all parties. 9th Cir. BAP R. 8011(d)-1(d).

4. Include an appendix that contains a conformed copy of the notice of appeal and the entered judgment, order or decree from which the appeal was taken. 9th Cir. BAP R. 8011(d)-1(b).

5. If the emergency motion concerns a stay pending appeal, the appendix must contain (1) a conformed copy of the bankruptcy court's order denying or granting the stay and an explanation by the court of its ruling, or a declaration explaining why such a copy is unavailable, and (2) copies of all papers regarding the stay filed in the bankruptcy court. 9th Cir. BAP R. 8011(d)-1(c).

E. Writ of Mandamus

Although it denied a petition for writ of mandamus on the merits in Salter v. Bankruptcy Court (In re Salter) 279 B.R. 278 (9th Cir. BAP, 2002), BAP decided a case of first impression, concluding that it did have the power to issue such a writ because BAP is court "established by Act of Congress" which is authorized by All Writs Act to issue writs of mandamus.

VIII. BRIEFING THE ISSUES

A. Filing and Formatting

1. After the BAP clerk receives a Certificate of Record from the bankruptcy clerk, a briefing schedule is issued. The appellant's opening brief and excerpts of record shall be served and filed within 15 days. FRBP 8009(a)(1). Briefs are deemed filed on the day of mailing. FRBP 8008(a).

2. The appellee's responsive brief shall be served and filed within 15 days after service of the appellant's opening brief. If the appellee has filed a cross-appeal, the brief shall contain the issues and argument pertinent to the cross-appeal, denominated as such, and the response to the appellant's brief. FRBP 8009(a)(2); 9006(f) (3 additional days allowed when service is performed by mail).

3. Reply Briefs. If the appellant desires to file a reply brief, the reply brief must be served and filed within 10 days after service of the appellee's brief. If the appellee has cross-appealed, he may file and serve a reply brief to the response of the appellant to the issues presented in the cross-appeal within 10 days after service of the reply brief. FRBP 8009(a)(3); 9006(f) (3 additional days allowed when service is performed by mail).

4. Contents of Briefs. Briefs shall conform to FRBP 8010 and FRAP 32(a). The appellant's brief shall contain under appropriate headings: (1) a table of contents, table of cases, statutes and other authorities, with references to the pages of the brief where they are cited; (2) a statement of the basis of appellate jurisdiction; (3) a statement

of the issues presented and the applicable standard of review; (4) a statement of the case; (5) a statement of facts with appropriate references to the record; (6) an argument; and (7) a short conclusion stating the precise relief sought. FRBP 8010(a)(1). The appellee's brief shall conform to the same requirements established for the appellant's opening brief except that a statement of the basis of appellate jurisdiction, issues, or the case need not be made. FRBP 8010(a)(2).

5. Certificates. Appellant's opening brief must include certifications of (1) interested parties, and (2) related cases. Appellee's responsive brief must also include a certification of interested parties. 9th Cir. BAP R. 8010(a)-1.

6. Formatting of Briefs. The BAP requires briefs to be produced by a standard typographic printing process with one-inch margins and at least 14 point proportional type or 10.5 point monospaced type, double-spaced, on opaque, unglazed paper. 9th Cir. BAP R. 8010(a)-1. The BAP Rules also require specific information to be included on the cover, designate cover colors for the opening and reply briefs and require the parties to attach certifications of interested parties and related cases to the covers. Id.

7. Length of Briefs. Except with leave of the Panel, the appellant's and appellee's initial briefs shall not exceed 30 pages and reply briefs shall not exceed 20 pages, exclusive of pages containing table of contents, tables of citations and addendums. 9th Cir. BAP R. 8010(c)-1. A motion for leave to file an oversize brief should be filed well in advance of the deadline for filing the brief. The party requesting the oversize brief should explain the need for going over the page limit; for example, if there are consolidated appeals or multiple issues.

8. Reference to Excerpts of Record (Appendix). The briefs must make specific references to the relevant portions of the record. FRBP 8010(a)(1)(D); see Dela Rosa v. Scottsdale Mem'l Health Sys., Inc., 136 F.3d 1241 (9th Cir. 1998); Mitchel v. General Elec. Co., 689 F.2d 877, 878-89

(9th Cir. 1982). Opposing parties and the court are not obliged to search the entire record unaided for error. Mitchel, 689 F.2d at 879. An affirmance may be premised on the failure of appellant to provide an adequate record. Ashley v. Church (In re Ashley), 903 F.2d 599, 605-06 (9th Cir. 1990). An appellate court may dismiss an appeal for failure to provide adequate citations to the record to permit review. See Mitchel, 689 F.2d at 879; see also N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997) ("By and large, we have been tolerant of minor breaches of one rule or another. Perhaps we are too tolerant sometimes. But there are times when our patience runs out. Then we strike an appellant's briefs and dismiss the appeal."); Perez, 30 F.3d at 1217 n.12 ("[T]he parties must comply with our rules sufficiently to enable us (and the BAP) to examine those materials that bear on their arguments.").

The BAP's imposition of sanctions for non-compliance with non-jurisdictional procedural requirements is reviewed by the Ninth Circuit under an abuse of discretion standard. Morrissey v. Stuteville (In re Morrissey) 349 F.3d 1187, 1190 (9th Cir. 2003)(appropriate sanctions may include summary affirmance of the bankruptcy court's decision).

9. Appendix to Brief (Excerpts of the Record). Appellant must serve and file with appellant's brief "excerpts of the record" as an Appendix in all BAP appeals. FRBP 8009(b). Caveat: The requirement of an Appendix is separate and distinct from the requirement of preparing the record per FRBP 8006-8007. Each BAP judge reviewing the appeal receives a copy of the Appendix to Brief, not a copy of the record and not a copy of an appendix to an appellate motion.

   i. Contents. The Appendix must include copies of the following:
      (a) complaint and answer or other equivalent pleadings;
      (b) any pretrial order;
      (c) judgment, order, or decree from which the appeal is taken;

(d) any other orders relevant to the appeal;
(e) the opinion, findings of fact, or conclusions of law filed or delivered orally by the court and citations of the opinion if published;
(f) any motion or response on which the court rendered decision;
(g) the notice of appeal;
(h) the relevant entries of the bankruptcy docket; and
(i) the transcript or pertinent portion thereof. FRBP 8009(b).

ii. The appellee may also serve and file an Appendix that contains additional materials omitted by appellant. Id.

iii. Form. The BAP has prescribed additional form requirements for the Appendix. Among other things, the BAP requires that the Appendix be bound separately with white covers, **be continuously paginated**, have a table of contents, and have **documents divided by tabs**. 9th Cir. BAP R. 8009(b)-1.

iv. Defective Appendix. The BAP is not obligated to examine portions of the record that are not included in the Appendix. Kritt, 190 B.R. at 386-87; accord, Bank of Honolulu v. Anderson (In re Anderson), 69 B.R. 105, 109 (9th Cir. BAP 1986); cf. Ashley v. Church (In re Ashley), 903 F.2d 599, 605-06 (9th Cir. 1990) (incomplete transcript in bankruptcy appeal to District Court).

B. Standard of Review

The appellant's opening brief must state the appropriate standard of review for the appeal. FRBP 8010(a)(1). Both sides should be familiar with the standard under which the appellate courts will review each issue. Findings of fact are reviewed for clear error, FRBP 8013, and legal issues are generally reviewed de novo, which means that the appellate court looks at the entire record before the bankruptcy court and gives no deference to the bankruptcy judge's legal conclusions. Mixed questions of law and fact are reviewed de novo. Murray v. Bammer (In re Bammer), 131 F.3d 788, 792 (9th Cir. BAP 1997).

The abuse of discretion standard of review applies to many types of bankruptcy court orders. A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Before reversal is proper under the abuse of discretion standard, the Panel must be definitely and firmly convinced that the bankruptcy court committed a clear error of judgment. AT&T Universal Card Servs. v. Black (In re Black), 222 B.R. 896, 899 (9th Cir. BAP 1998).

The Panel does not reverse for errors not affecting substantial rights of the parties and may affirm for any reason supported by the record. 28 U.S.C. § 2111; FRCP 61, incorporated by FRBP 9005; Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999); Polo Bldg. Group v. Rakita (In re Shubov), 253 B.R. 540, 547 (9th Cir. BAP 2000).

C. Service

Copies of all papers filed by any party (and not required by these rules to be served by the clerk of the BAP) shall, at or before the time of filing, be served by the party or a person acting for the party on all other parties to the appeal. Service on a party represented by counsel shall be made on counsel. FRBP 8008(b).

D. Motions for Extension of Time

1. Procedure. If a party seeks to file a brief but is unable to do so within the time prescribed by the BAP's scheduling order, the party may move for an extension of time for filing a brief. 9th Cir. BAP R. 8009(a)-1. Requests for extensions should be limited to 30 days, and 15 days is preferable. A motion for an extension of time for filing a brief shall be made within the time limit prescribed by the BAP Rules for the filing of such brief and shall be accompanied by a proof of service.

2. Contents. The motion shall be supported by a declaration stating the time when the brief is due, how many extensions of time, if any, have been granted, when the brief was first due, and whether any previous requests have been denied or

denied in part. The motion shall also state the reasons why such an extension is necessary and the amount of time requested. Finally, the motion shall state the position of the opponent(s) in respect to the motion or state why the moving party has been unable to obtain a statement of such position(s). Id.

3. No Automatic Extensions. The BAP has no obligation to consider a late brief and may impose sanctions such as waiver of oral argument, monetary sanctions, or dismissal. 9th Cir. BAP R. 8009(a)-1(3).

E. Issues on Appeal

1. Generally, appellate courts do not consider arguments "that are not 'properly raise[d]' in the trial courts." O'Rourke v. Seaboard Sur. Co. (In re Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989). Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996)

2. The Ninth Circuit recognizes three narrow, discretionary exceptions to the general rule: (1) to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law. Jovanovich v. United States, 813 F.2d 1035, 1037 (9th Cir. 1987), citing Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985).

3. In addition, the BAP must consider matters affecting its jurisdiction sua sponte even if not briefed by the parties. See Vylene Enters., Inc. v. Naugles, Inc. (In re Vylene Enters., Inc.), 968 F.2d 887, 889 (9th Cir. 1992), citing Pizza of Hawaii, 761 F.2d at 1377.

4. An appellate court generally will not consider an issue raised by an appellant for the first time in a reply brief. See United States v. Montoya, 45 F.3d 1286, 1300 (9th Cir. 1995) (issues not raised and argued in the opening brief are deemed waived); Law Offices of Neil Vincent Wake v. Sedona Inst. (In re Sedona Inst.), 220 B.R. 74, 76 (9th Cir. BAP 1998). However, an issue raised by

an appellant for the first time in a reply brief is not waived if the appellee has briefed the issue. See United States v. Bohn, 956 F.2d 208, 209 (9th Cir. 1992) ("Although we ordinarily decline to consider arguments raised for the first time in a reply brief, we may consider them if ... appellee raised the issue in its brief.").

F. Developments while Appeal Pending

1. Duty of Attorneys. Attorneys have a "'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." Board of License Comm'rs v. Pastore, 469 U.S. 238, 240 (1985). See also Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997) ("It is the duty of counsel to bring to the federal tribunal's attention, 'without delay,' facts that may raise a question of mootness.").

2. Procedures for Informing the BAP. Although counsel has a duty to inform the court of a change in law or facts that may affect the appeal, neither FRBP nor BAP Rules address the manner for doing so. It is likely that a party may simply provide a case citation with a short explanation (and serve it on all parties to the appeal) why the new ruling, development, or statute substantively affects the appeal. In addition, the BAP has sometimes permitted an appellant to supplement the appellate record. See Plaintiff's Class Claimants in New Jersey Actions v. Elsinore Corp. (In re Elsinore Corp.), 228 B.R. 731, 733 n.1 (9th Cir. BAP 1998) (appellants permitted to supplement appellate record with a district court decision decided after the notice of appeal was filed because it was helpful in clarifying appellants' claims against the debtor). But see Morgan v. Safeway Stores, Inc., 884 F.2d 1211, 1213 (9th Cir. 1989) (denying motion to supplement record with "newly discovered evidence" that was not shown to be in fact newly discovered and was neither probative, nor added to the record).

3. Once the appeal is set for oral argument, it is particularly important to advise the BAP if the parties have settled or are in the process of settling. If settlement requires approval of the bankruptcy court, any motion for continuance

should be supported by a declaration regarding the status of the settlement discussions and indicating whether a hearing on approval has been set before the bankruptcy court.

G. Amicus Curiae Briefs

1. The BAP accepts amicus briefs on occasion. E.g., Rancho Bernardo Ltd. P'ship v. First Alliance Corp. (In re First Alliance Corp.), 140 B.R. 531, 532 (9th Cir. BAP 1992); Canadian Commercial Bank v. Hollywood Hotel (In re Hotel Hollywood), 95 B.R. 130 (9th Cir. BAP 1988); Industrial Indem. Co. v. Seattle-First Nat'l Bank (In re North Side Lumber Co.), 83 B.R. 735, 737 (9th Cir. BAP 1987), aff'd, 865 F.2d 264 (9th Cir. 1988).

2. Since there is no mention of amicus curiae in the BAP Rules or in Part VIII of FRBP, the BAP looks to FRAP 29 and 9th Cir. R. 29-1 for the appropriate procedure. 9th Cir. BAP R. 8018(b)-1 ("Silence of Local Rules"). Under FRAP 29, an amicus brief may only be filed if accompanied by the written consent of all parties, or by leave of court granted on motion or at the request of the court (except that consent or leave shall not be required when the brief is presented by the United States or an officer or agency thereof, or by a State, Territory or Commonwealth). FRAP 29.

3. The 9th Circuit forbids reply briefs to amicus briefs, disfavors multiple amicus briefs raising the same points in support of one party, and encourages those who merely wish to join in arguments asserted in another brief to file and serve a short letter so stating in lieu of a brief. 9th Cir. R. 29-1 (Advisory Committee Note).

IX. ORAL ARGUMENT

A. Scheduling

Oral argument is scheduled in nearly all fully briefed cases. Upon the filing of appellee's brief, the BAP Clerk will set the appeal for oral argument to occur typically 30-45 days after the appellee's brief was filed. Argument is generally scheduled for the third week of the month. Counsel should advise the BAP clerk

of anticipated schedule conflicts in writing not later than the time the appellee's brief is filed. If the Panel determines in accordance with FRBP 8012 that oral argument is not needed, it will so order.

B. Location of Hearing

The BAP Clerk provides notice of the time and place of argument. The BAP can sit at any location in the Ninth Circuit. When economical and feasible, the appeal will be set for hearing in the location at which the appeal arose. Counsel who desire and agree to a different location should inform the BAP Clerk in writing at the earliest possible date and not later than the time the appellee's brief is filed. Once scheduled, continuances are granted only under exceptional circumstances. 9th Cir. BAP R. 8012-1.

C. Video and Telephone Conference Hearings

The BAP does permit counsel to request permission to appear and argue by way of video or telephone conference. In addition, in the interest of expeditious scheduling of oral argument, the BAP may set an appeal for oral argument by video or telephone conference. In such circumstance, counsel normally has the option of appearing from the remote location or traveling to the site at which the Panel is sitting.

D. BAP Panel Preparation

The three Panel judges review the briefs and the Appendices to Brief before oral argument. In addition, the judge who is designated as the "lead" judge for purposes of writing the final disposition prepares a bench memorandum that is circulated to the other judges. The judges usually discuss each case prior to oral argument to flesh out the issues and survey tentative positions of each judge.

E. Effective Oral Argument

1. Oral argument is typically limited to fifteen minutes per side. Appellants usually reserve five of their fifteen minutes for rebuttal. Parties aligned on the same side are asked to divide their time.

2. Counsel should not attempt to convey every fact and argument in the briefs; the BAP judges thoroughly review the briefs and the excerpts of record before oral argument. Rather, one should summarize the arguments and directly answer judges' questions so as to clarify a factual or legal issue or to allay concerns the judges may have.

3. A common mistake at oral argument is to disregard or sidestep a judge's question. That judge's vote may turn upon the answer. Given the limited amount of time available, counsel should make every effort to satisfy the judges' concerns before moving on to the remainder of the argument; there is no guarantee that there will be time later in the argument to get back to the answer.

4. Good appellate advocates are not wedded to their scripts and are familiar with every aspect of the case and the arguments of opposing counsel, including pertinent facts, legal issues, controlling or persuasive case law, and the current procedural posture of the bankruptcy case. They are prepared to elaborate on legal or factual issues that may not have been emphasized in their briefs, to explore a narrow legal issue, or to discuss the ramifications of a published decision. They also are not afraid to consume fewer than fifteen minutes if there are no questions.

F. New Matters or Matters Outside of the Briefs

Generally, an appellate court will not consider matters that are not specifically and distinctly argued in the appellant's opening brief. See United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992); see also Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991)(issue raised in reply brief would not be considered, particularly since the appellant's failure to properly brief the issue "clearly misled the appellee"); Sedona Inst., 220 B.R. at 76.

X. SANCTIONS

Sanctions for frivolous appeals, in the form of just damages and single or double costs, are awarded only upon a separately filed motion or after notice from the BAP and reasonable opportunity to respond. FRBP 8020. Requests for

sanctions in briefs are usually ignored and may create the impression that counsel has deficient professional knowledge.

XI. DECISION

A. After Oral Argument

The judges confer (usually right after the hearing) to come to a tentative decision. The judge assigned to write the disposition then circulates a draft for formal votes. Once all comments have been considered by the lead judge, and any concurrences or dissents have been prepared, the lead judge transmits the disposition to the BAP Clerk, who files it on behalf of the Panel and serves the parties. Most BAP appeals are decided within nine months of filing of the notice of appeal.

B. Opinions and Memoranda

An "opinion" is a formal reasoned disposition of the case that is intended for publication. See 9th Cir. BAP R. 8013-1. A "memorandum" is a written reasoned disposition of a case that is not intended for publication and can only be cited for limited purposes. Id. In the 12 months ending September 30, 2003, 27% of final BAP decisions were published.

C. Publication

The criteria for determining to issue a published opinion are whether it: (1) establishes, alters, modifies, or clarifies a rule of law; (2) calls attention to a rule of law which appears to have been generally overlooked; (3) criticizes existing law; or (4) involves a legal or factual issue of unique interest or substantial public importance. 9th Cir. BAP R. 8013-1(a).

D. Request for Publication

Publication of any unpublished disposition may be requested by letter addressed to the Panel clerk, stating concisely the reasons for publication. Such a request must be received no later than 30 days after the filing of the memorandum. 9th Cir. BAP R. 8013-1(d).

E. Mandate

The BAP mandate is a certified copy of the panel's judgment or final order that is sent to the bankruptcy court. It is issued in accordance with the time frame set forth in FRAP 41. Copies are not usually sent to the parties.

F. Motions for Rehearing - FRBP 8015

FRBP 8015 requires motions for rehearing to be filed within ten days after entry of the judgment of the BAP. If a timely motion for rehearing has been filed, the time for appeal to the court of appeals begins to run from the entry of an order disposing of the motion for rehearing. See also FRAP 4(a)(4).

Motions for rehearing will delay issuance of the appellate court's mandate until seven days after the order is entered. FRAP 41.

G. Appeals to the Ninth Circuit Court of Appeals - FRAP 6

A notice of appeal to the court of appeals must be filed within 30 days after the entry of a final judgment/order of the BAP or district court (60 days if the United States or an officer or agency thereof is one of the parties.) FRAP 4(a)(1). The notice of appeal is filed with the court that issued the ruling, either the BAP or district court. A filing fee of $105 is required, made payable to the "Clerk of Court." A timely motion for rehearing under FRBP 8015 tolls the time for filing the notice of appeal. See FRAP 4(a) and FRAP 6.

Unlike the district court and the BAP, the Ninth Circuit Court of Appeals does not have discretion to hear interlocutory appeals. See 28 U.S.C. § 158(d); Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs), 327 F.3d 930, 933-34 (9th Cir. 2003). The order on appeal must be a final order of both the bankruptcy court and the district court or BAP. Alexander v. Compton (In re Bonham), 229 F.3d 750, 761 (9th Cir. 2000). Note: Although remand orders are generally interlocutory, in certain circumstances they may be considered final. See Virtual Vision, Inc. v. Praegitzer Indus., Inc. (In re Virtual Vision, Inc.), 124 F.3d 1140, 1143 (9th Cir. 1997); Vylene Enters., Inc. v. Naugles, Inc. (In re

Vylene Enters., Inc.), 968 F.2d 887, 890 (9th Cir. 1992). See also Scovis v. Henrichsen (In re Scovis), 249 F.3d 975 (9th Cir. 2001).

Requests for stay pending appeal to the Circuit are presented first to the BAP, the same way BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A) (made applicable by FRAP 6(b)(1)(C)).

XII. BAP DECISIONS AS PRECEDENT

A. The Ninth Circuit has not determined whether BAP decisions are binding in the "circuit as a whole." Zimmer v. PBS Lending Corp. (In re Zimmer), 313 F.3d 1220, 1225 n. 3 (9th Cir. 2002) (noting that the binding nature of BAP decisions is still an open issue in the Ninth Circuit); Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (BAP decisions cannot bind district courts, but declining to decide the authoritative effect of a BAP decision).

B. The BAP has held that its decisions bind all bankruptcy courts in the Ninth Circuit. In re Windmill Farms, Inc., 70 B.R. 618, 621 (9th Cir. BAP 1987), rev'd on other grounds, 841 F.2d 1467 (9th Cir. 1988). However, some bankruptcy courts have ruled that BAP decisions do not bind them. Compare CASC Corp. v. Milner (In re Locke), 180 B.R. 245, 254 (Bankr. C.D. Cal. 1995) (BAP decisions not binding on bankruptcy courts), with Life Ins. Co. of Va. v. Barakat (In re Barakat), 173 B.R. 672, 676-80 (Bankr. C.D. Cal. 1994) (BAP decisions binding on bankruptcy courts), aff'd on other grounds, 99 F.3d 1520 (9th Cir. 1996).

C. The BAP, for itself, regards the precedents established in prior published BAP opinions as binding on itself absent changes in statute or controlling Ninth Circuit or Supreme Court precedent. Ball v. Payco-General Am. Credits, Inc. (In re Ball), 185 B.R. 595, 597 (9th Cir. BAP 1995). Unpublished memoranda are not binding on subsequent panels. The BAP has no procedures for en banc review of its 3-judge Panel decisions.

D. As a practical matter, experience teaches that well-reasoned BAP opinions are commonly regarded as persuasive by the court of appeals, and by district courts and bankruptcy courts within the Ninth Circuit, regardless of whether they are formally binding.

XIII. INFORMATION AND STATISTICS

The BAP has historically dealt with approximately 60% of total Ninth Circuit bankruptcy appeals under 28 U.S.C. § 158(a), the "opt-out" rate of about 40% having been relatively stable through the years.

About one-third of all BAP appeals go through the entire process of briefing, oral argument, and decision on the merits. Of the appeals that completed that process in the 12 months ending December 31, 2003, the median time for disposition of an appeal in which argument was allowed was 9.3 months; if an appeal was submitted on briefs, it was 8.4 months. The median time from submission to final disposition was about 45 days. 151 appeals were disposed on the merits; the reversal rate was 25.8%.

During 2003, 208 bankruptcy appeals were filed at the Court of Appeals for second level appellate review: 85 from decisions of the Bankruptcy Appellate Panel and 123 from decisions of the district courts. Thus, for the 443 appeals which proceeded before the Bankruptcy Appellate Panel, 81% were fully resolved with only 19% seeking second level review.

The BAP's website (www.ce9.uscourts.gov/bap) includes recently published opinions, the BAP's rules, and other information for litigants.

XIV. CONCLUSION

This guide is merely an introduction to the sometimes arcane world of bankruptcy appeals. The procedural road map should be of assistance but is no substitute for preparation and familiarity with the FRBP and the BAP Rules. The main advantage of BAP is that its judges are seasoned bankruptcy judges who are expert in bankruptcy law and who are dedicated to producing the predictability that is a by-product of a uniform body of law based on carefully-reasoned decisions that are rendered as promptly as possible.

APPENDIX I

Do's and Don'ts for an Effective Appeal

Do:

1. Know your audience. BAP judges generally possess a level of expertise in bankruptcy matters superior to that of most district court judges and their law clerks.

2. Understand the role of the appellate court. While its dominant role is to assess whether the trial court reached the correct result, the appellate court is also concerned with the overall impact of its ruling on the general body of bankruptcy law.

3. Clarify the standard of review and frame arguments around that standard.

4. Simplify the story. Write with punch - short, crisp, essential facts.

5. Organize your brief with short headings, rather than long sentence headings.

6. Paraphrase quotes whenever possible. Long block quotes are soporific.

7. Focus your appellant's argument on areas where the judge's ruling is most susceptible to being reversed.

8. Provide an adequate record, and know what is in it. Follow the rules with respect to organizing, paginating and tabbing the record (appendix), so that the judges and law clerks can find pertinent excerpts quickly.

9. Use a conversational tone rather than a formally structured oral argument. This helps facilitate the transitions that are inevitable when interrupted with questions from the Panel. Feel free to take less than your allotted time. Expect the most questions to be asked of the party with the weakest position, and expect numerous questions about facts and procedure.

10. Be honest and direct in answering the panel members' questions. Acknowledge the weaknesses of your case. Use policy arguments sparingly, if at all.

11. Listen to questions asked of your opponent and be ready to fill in the blanks on matters of concern to the panel.

12. Know what relief you want (and why).

Don’t:

1. Use many words when a few will do.

2. Make convoluted arguments.

3. Make grammatical or typographical errors.

4. Write in a disorganized and unintelligible manner.

5. Attack the trial judge or opposing counsel.

6. Use block quotes extensively.

7. Overuse policy arguments or § 105.

8. Avoid direct answers to the judges’ questions.

9. Deflect the question and distract the judge if it is not the question you wanted to hear.

10. Cut off the judge’s question in mid-sentence.

11. Be ignorant of the record or mischaracterize the record.

12. Blame your unfamiliarity with the record on the fact that you did not handle the case at the trial level. (The “SODDI” excuse - “some other dude did it”).

APPENDIX II

Traps for the Unwary

1. 10-day appeal period. This is calendar days, not court days. FRBP 9006(a). The period begins to run from entry of the judgment or order to be appealed, not notice. Failure to receive notice or failure of the clerk to serve notice of the entry of the order will not excuse an untimely notice of appeal. It is the appealing party's responsibility to monitor the docket for entry of the order.

2. A motion to dismiss an appeal as untimely before the expiration of the time to request an extension under FRBP 8002(c), alerts your opponent how to save the appeal.

3. An appeal from an untimely tolling motion under FRBP 8002(b) only raises the issue of the appropriateness of the order resolving the tolling motion, not the underlying order. The standard for reversing a denial of reconsideration is usually much harder than to reverse the initial decision. Make a timely appeal or motion to extend time to appeal if your tolling motion is not timely filed.

4. Statement of Election to have appeal heard by district court - Appellant's election must be filed at the same time as the Notice of Appeal, in a separate document, not attached to or incorporated in the body of the Notice of Appeal.

5. If the order on appeal is not final, appellant must obtain FRCP 54(b) certification from the trial court or move the BAP for leave to appeal.

6. Obtain a stay pending appeal if necessary to avoid mootness. Motions for stay will not ordinarily be considered unless they are first made to the bankruptcy court or the movant explains why the stay wasn't obtained from the bankruptcy court. FRBP 8005. "I didn't think the bankruptcy judge would grant my stay" is not usually a sufficient explanation. It is usual for a stay to be denied by the BAP, without prejudice, for failure to bring the motion to the bankruptcy court in the first instance. If time is of the essence, make sure the stay motion is made before the correct court. It may head off problems later if at the beginning of your request for stay directed to the bankruptcy court, you cite to Ho v. Dai Hwa Electronics (In re Ho), 265 B.R. 603 (9th Cir. BAP 2001), to establish that the bankruptcy court retains jurisdiction to rule on a motion for stay pending appeal, even after a notice of appeal has been filed.

7. Understand the standard of review and what hurdles need to be overcome to obtain a reversal.

8. Separate judgment rule. Be aware that a separate judgment is usually required. Your appeal may be delayed until a separate judgment is entered.

9. Support your brief with your excerpts of the record. Do not expect that the panel will look at any supporting documents filed with intermediate motions. The excerpts of the record need to stand alone as support for your position. The excerpts may only contain items that are part of the record on appeal. FRBP 8006. Make sure your excerpts include the items listed in 8009(b); each item is clearly tabbed; pages are consecutively numbered.

10. Ninth Circuit jurisdiction may differ from BAP or district court jurisdiction. The Circuit has jurisdiction over final orders only. A district court or BAP decision on an interlocutory appeal is not reviewable by the Circuit until the matter becomes final at the bankruptcy court level.

11. Motions for reconsideration or rehearing after the BAP has rendered its decision must be made within 10 days. FRBP 8015. A timely motion for reconsideration or rehearing tolls the time to appeal to the Circuit. An untimely motion does not. The time to appeal to the Circuit is normally 30 days from the entry of the BAP decision; if the United States is a party the time is 60 days. FRAP 4 and 6.

12. Requests for stay pending appeal to the Circuit are made to the BAP, the same way BAP appeal stay requests are initially made to the bankruptcy court. FRAP 8(a)(1)(A) (made applicable by FRAP 6(b)(1)(C)).

13. Requests for sanctions must be made in a separately filed motion. FRAP 8020.

14. Appellees, supplement an inadequate record sparingly, as you may be inadvertently helping appellant. File a motion to dismiss for inadequate record instead.

Appendix III

NEW BANKRUPTCY APPEAL FILINGS
Twelve Months Ending December 31, 2003

District	Bankruptcy Appellate Panel	District Court	Total
Alaska	1	4	5
Arizona	39	38	77
C. Cal.	179	132	311
E. Cal.	38	43	81
N. Cal.	52	47	99
S. Cal.	25	26	51
Hawaii	4	6	10
Idaho	11	9	20
Montana	6	6	12
Nevada	20	35	55
Oregon	10	7	17
E. Wash.	6	10	16
W. Wash.	26	38	64
TOTALS	417 51%	401 49%	818 100%

UNITED STATES BANKRUPTCY
APPELLATE PANEL OF
THE NINTH CIRCUIT

Effective November 18, 1988; as amended through May 9, 2002

AMENDED ORDER CONTINUING THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

JUDICIAL COUNCIL OF THE NINTH CIRCUIT AMENDED ORDER CONTINUING THE BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

1. Continuing the Bankruptcy Appellate Panel Service.

(a) Pursuant to 28 U.S.C. § 158(b)(1) as amended by the Bankruptcy Reform Act of 1994, the judicial council hereby reaffirms and continues a bankruptcy appellate panel service which shall provide panels to hear and determine appeals from judgments, orders and decrees entered by bankruptcy judges from districts within the Ninth Circuit.

(b) Panels of the bankruptcy appellate panel service may hear and determine appeals originating from districts that have authorized such appeals to be decided by the bankruptcy appellate panel service pursuant to 28 U.S.C. § 158(b)(6).

(c) All appeals originating from those districts shall be referred to bankruptcy appellate panels unless a party elects to have the appeal heard by the district court in the time and manner and form set forth in 28 U.S.C. § 158(c)(1) and in paragraph 3 below.

(d) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders and decrees entered by bankruptcy judges and, with leave of bankruptcy appellate panels, appeals from interlocutory orders and decrees entered by bankruptcy judges.

(e) Bankruptcy appellate panels may hear and determine appeals from final judgments, orders, and decrees entered after the district court from which the appeal originates has issued an order referring bankruptcy cases and proceedings to bankruptcy judges pursuant to 28 U.S.C. § 157(a).

2. Immediate Reference to Bankruptcy Appellate Panels.

Upon filing of the notice of appeal, all appeals are immediately referred to the bankruptcy appellate panel service.

3. Election to District Court - Separate Written Statement Required.

A party desiring to transfer the hearing of an appeal from the bankruptcy appellate panel service to the district court pursuant to 28 U.S.C. § 158(c)(1) shall timely file a separate written statement of election expressly stating that the party elects to have the appeal transferred from the bankruptcy appellate panel service to the district court.

(a) Appellant: If the appellant wishes to make such an election, appellant must file a separate written statement of election with the clerk of the bankruptcy court at the time of filing the notice of appeal. Appellant shall submit the same number of copies of the statement of election as copies of the notice of appeal. See Bankruptcy Rule 8001(a). When such an election is made, the clerk of the bankruptcy court shall forthwith transfer the case to the district court. The clerk of the bankruptcy court shall give notice to all parties and the clerk of the bankruptcy appellate panels of the transfer at the same time and in the same manner as set forth for serving notice of the appeal in Bankruptcy Rule 8004.

(b) All Other Parties: In all appeals where appellant does not file an election, the clerk of the bankruptcy court shall forthwith transmit a copy of the notice of appeal to the clerk of the bankruptcy appellate panels. If any other party wishes to have the appeal heard by the district court, that party must, within thirty (30) days after service of the notice of appeal, file with the clerk of the bankruptcy appellate panels a written statement of election to transfer the appeal to the district court. Upon receipt of a timely statement of election filed under this section, the clerk of the bankruptcy appellate panels shall forthwith transfer the appeal to the appropriate district court and shall give notice of the transfer to the parties and the clerk of the bankruptcy court. Any question as to the timeliness of an election shall be referred by the clerk of the bankruptcy appellate panels to a bankruptcy appellate panel motions panel for determination.

4. MOTIONS DURING ELECTION PERIOD

All motions relating to an appeal shall be filed with the bankruptcy appellate panel service unless the case has been transferred to a district court. The bankruptcy appellate panels may not dismiss or render a final disposition of an appeal within thirty (30) days from the date of service of the notice of appeal, but may otherwise fully consider and dispose of all motions.

5. PANELS

Each appeal shall be heard and determined by a panel of three judges from among those appointed pursuant to paragraph 6, provided however that a bankruptcy judge shall not participate in an appeal originating in a district for which the judge is appointed or designated under 28 U.S.C. § 152.

6. MEMBERSHIP OF BANKRUPTCY APPELLATE PANELS

The bankruptcy appellate panel shall consist of seven members serving seven-year terms (subject to reappointment to one additional three-year term). The judicial council shall periodically examine the caseload of the bankruptcy appellate panel service to assess whether the number of bankruptcy judges serving should change. Appointment of regular and pro tem bankruptcy judges to service on the bankruptcy appellate panel shall be governed by regulations promulgated by the Judicial Council.

(a) When a three-judge panel cannot be formed from the judges designated under subparagraph (a) to hear a case because judges have recused themselves, are disqualified from hearing the case because it arises from their district, or are otherwise unable to participate, the Chief Judge of the Ninth Circuit may designate one or more other bankruptcy judge(s) from the circuit to hear the case.

(b) In order to provide assistance with the caseload or calendar relief, or otherwise to assist the judges serving, or to afford other bankruptcy judges with the opportunity to serve on the bankruptcy appellate panels, the Chief Judge of the Ninth Circuit may designate from time to time one or more other bankruptcy judge(s) from the circuit to participate in one or more panel sittings.

7. CHIEF JUDGE

The members of the bankruptcy appellate panel service by majority vote shall select one of their number to serve as chief judge.

8. RULES OF PROCEDURE

(a) Practice before the bankruptcy appellate panels shall be governed by Part VIII of the Federal Rules of Bankruptcy Procedure, except as provided in this order or by rule of the bankruptcy appellate panel service adopted under subparagraph (b).

(b) The bankruptcy appellate panel service may establish rules governing practice and procedure before bankruptcy appellate panels not inconsistent with the Federal Rules of Bankruptcy Procedure. Such rules shall be submitted to, and approved by, the Judicial Council of the Ninth Circuit.

9. PLACES OF HOLDING COURT.

Bankruptcy appellate panels may conduct hearings at such times and places within the Ninth Circuit as it determines to be appropriate.

10. CLERK AND OTHER EMPLOYEES.

(a) Clerk's Office. The members of the bankruptcy appellate panel service shall select and hire the clerk of the bankruptcy appellate panel. The clerk of the bankruptcy appellate panel may select and hire staff attorneys and other necessary staff. The chief judge shall have appointment authority for the clerk, staff attorneys and other necessary staff. The members of the bankruptcy appellate panel shall determine the location of the principal office of the clerk.

(b) Law Clerks. Each judge on the bankruptcy appellate panel service shall have appointment authority to hire an additional law clerk.

11. EFFECTIVE DATE

This Order shall be effective as to all appeals originating in those bankruptcy cases that are filed after the effective date of this Order. For all appeals originating in those bankruptcy cases that were filed before October 22, 1994, the Judicial Council's prior Amended Order, as revised October 15, 1992, shall apply. This Order, insofar as just and practicable, shall apply to all appeals originating in those bankruptcy cases that were filed after the effective date of the Bankruptcy Reform Act of 1994, October 22, 1994, but before the date of this Order.

IT IS SO ORDERED.

DATE: April 28, 1995; amended May 9, 2002.